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In the Matter of:)
)
PROBABLE CAUSE HEARING:) MUR 5625
ARISTOTLE, INC.)

Hearing Room
Federal Elections Commission
999 E Street, N.W.
Washington, D.C.

BEFORE :

GENERAL COUNSEL FOR FEC - THOMASENIA DUNCAN

On Behalf of Respondent Aristotle:

Heritage Reporting Corporation
(202) 628-4888

P R O C E E D I N G S

(3:13 p.m.)

CHAIRMAN WALTHER: We are now beginning the public hearing for the Probable Cause Hearing before the Federal Elections Commission, and it's in the matter of Aristotle, Inc., MUR 5625.

Representing the Respondent, Aristotle, is Steven Hershkowitz from the Law Firm of Sandler, Reif & Young. Welcome.

MR. HERSHKOWITZ: Thank you.

CHAIRMAN WALTHER: On June 10, 2009, the Office of General Counsel sent its brief to the Respondent and notified the Respondent that the OGC was preparing to recommend that the Commission was finding probable cause to believe that a knowing and willful violation of 2 U.S.C. ' 438(a)(4) has occurred.

On July 28, 2009, Respondent filed its reply brief and notified OGC that the Respondent was requesting a probable cause hearing.

Mr. Hershkowitz was advised by OGC in a letter dated September 15, 2009, you will have 15 minutes for your opening statement.

Your statement should only present issues, arguments and evidence you have already briefed or brought to the attention of the Office of General Counsel.

1 Following the presentation, the commissioners,
2 general counsel, and the staff director will have the
3 opportunity to answer questions. You will then have the
4 opportunity to make a minute closing statement.

5 The Commission will provide a transcript of the
6 hearing, which will become a part of the record in this
7 matter.

8 In addition to the commissioners who are here
9 today, from the Office of General Counsel, we have Tommy
10 Duncan, Christine Gallagher, Sid Rock, and Kathleen Guth.
11 On my left is Alec Palmer, our acting staff director.

12 Welcome, and you may proceed.

13 MR. HERSHKOWITZ: Thank you, Chairman, and I would
14 like to thank the Commission for letting me be here today.

15 I know you've given me 15 minutes of uninterrupted
16 time. I'm not used to getting any uninterrupted time. So I
17 will be glad to take, you know, questions at any time, and,
18 in fact, I don't intend to take the full 15 minutes, maybe
19 five minutes, just to explain why I asked for the hearing
20 today.

21 This case raises a lot of issues that we've
22 covered in our brief, I think, quite extensively and
23 sufficiently, but there are three issues that I believe are
24 worthy of discussion and would be useful to the Commission
25 to have a discussion with counsel for Aristotle rather than

1 just reading the material in the paper, and those are how
2 the compliance vetting feature actually works.

3 The problem that we have found when we've reviewed
4 the advice from the Commission, which we think is, at best,
5 muddled, and we are recommending that the Commission, rather
6 than bringing an enforcement case to resolve that, should,
7 in fact, consider rule-making or some other kind of
8 procedure to clarify how 438(a)(4) should be applied in
9 situations where it's been argued by two different sides
10 that there are two different uses for the FEC data.

11 Finally, this case, I think, raises a unique issue
12 that the Commission is going to have to face sooner or
13 later, and that's to resolve the policy question about using
14 computer technology, advanced word processing and other
15 kinds of technology, to enhance the compliance function that
16 you want committees to do for you.

17 Aristotle certainly agrees with the Commission
18 that a committee should assume the primary responsibility
19 for accurately filing reports and making sure that their
20 contributors comply with limits and the other regulations
21 that the Commission has, and, today, the Commission's
22 regulations impede a lot of that activity. In fact, one of
23 the issues that we've raised today is whether or not, even
24 without a change, we can use computer technology to increase
25 the compliance capabilities of the committees.

1 Now, the basic facts of how the feature works
2 should not be contested. The only way this feature operates
3 is if a committee already has the name and address of a
4 potential contributor in their database. Somebody can't be
5 curious and go into the feature and look someone up to find
6 out who they contributed to in the past, the way any of us
7 can do when we go down to the information office down on the
8 first floor. The information has to be in the committee's
9 database.

10 The only reason to do that would be if there is
11 some reason for a staff member of the committee to, in fact,
12 go to the feature. You know, I think we'll get into this in
13 a little more detail later, but nobody is going to be
14 harassed because this feature exists.

15 The decision has to be made that we are going to
16 make a phone call or have received a contribution from
17 someone already in the database before anybody goes and
18 looks anything up, and what they find is a contribution
19 history, not contributor information. There's no addresses,
20 no phone numbers; just a contribution history, which cannot
21 be used to create a list of potential contributors. The
22 list of potential contributors already exists in the
23 database of the committee.

24 What do you use that information for? Well, the
25 functional design of the system is set up so that it can't

1 be used for list brokering. You cannot download the
2 information into your database. You can read it, you can
3 copy it by hand, but you can't download it.

4 It's a one-time look-up for each individual
5 potential contributor, and it can be used for -- we think
6 the purpose it should be used for is compliance and vetting;
7 that is, whether or not a contribution exceeds the limit for
8 that contributor or whether or not that contributor has
9 provided funds -- a donation, a contribution -- to someone
10 who the candidate doesn't want to be associated with and,
11 therefore, will not want to accept that contribution.

12 Now, the general counsel has pointed out, during
13 the first four months after this feature was implemented,
14 there were advertisements that said you could use this
15 feature to determine how much someone has given to other
16 committees and that you, as a fundraiser, should ask for at
17 least that amount of money.

18 Well, that advertisement should never have gone
19 out. It did go out. It was a mistake. It was pulled, and
20 it only existed for approximately four months.

21 But even if that occurred, that would still not be
22 a violation because what would normally happen, if someone
23 has decided that they are going to solicit a contribution,
24 the normal thing to do is to ask for as much money as you
25 can get. If, in fact, they ask for less money, that would

1 be a good thing, as far as the Commission is concerned,
2 because it means that they would be asking for money below
3 the contribution limit, but they aren't going to ask for
4 more.

5 Now, that was the functional design. That was the
6 subjective intent. The facts are, nobody uses this. The
7 bad part is no one is interested in doing compliance. We
8 have warnings all over this thing that you can't use it for
9 solicitation, you can use it for compliance, and you should
10 use it for compliance. It's not used.

11 For 10 months between -- it's in the declaration -
12 - I think it's 2007 and 2008, it was disabled. Not one
13 phone call came in asking for what had happened or asking
14 for permission to find out a way to use it. We ran an
15 experiment for about 11 months and found three committees
16 were using it, and they used it more than five times, and we
17 decided that -- we don't know why they used it, but the
18 numbers are so low that it seems to be for something like
19 education, where they were trying to show people how to use
20 the system.

21 There is testimony that was provided on a
22 voluntary basis by the sales staff who actually meet with
23 clients and do the presentations that they started
24 explaining how this feature worked, initially. They got
25 blank stares, people weren't interested, and they stopped

1 talking about it.

2 There is one footnote in the general counsel's
3 brief, and we have a declaration from the sales person that
4 somebody did ask about it. When he explained what the use
5 of the system was, they lost interest and never used it.

6 That's the system. It is sold to treasurers. It
7 is not sold to fundraisers. It's in the treasurer's
8 function, so the treasurer can do compliance when that
9 contribution comes in. That's not to say that a fundraiser
10 couldn't use it, but that's not who it's sold to, and that's
11 not who it's provided to. As I said, nobody uses it.

12 Now, the reason we think that there is a problem
13 that the Commission should resolve, in terms of its advisory
14 opinions and its MURs, is that we have advisory opinions
15 that say information can be used for campaign-related
16 purposes as long as it's not the name and address of a
17 contributor. We have other places where you say it's okay
18 to download and copy the names and addresses of
19 contributors.

20 In one MUR, and this is MUR 5155, where a list
21 broker went to the Internet and downloaded information from
22 Money Line's website that contained names and addresses, and
23 after he did solicitations, the Commission found that that
24 was not a violation by Money Line because they were giving
25 some of it away for free. They also had a subscription

1 section that had the same information, but because this list
2 broker took the information from the free side, the
3 Commission decided that that was not a violation.

4 If it comes down to that, Aristotle can put this
5 feature on its website and give it away for free. It can do
6 that by the end of the week. Nobody is using it. They
7 would be more than happy, if that resolves the Commission's
8 concerns, to put it on their website.

9 As I initially stated, I think the big issue for
10 the Commission, aside from Aristotle, which is just one
11 entity, the big issue for the Commission is, should the
12 Commission be revising its regulations in a way that
13 encourages campaign committees to use the computer and the
14 information in the FEC's database to increase their
15 compliance with the Commission's regulations?

16 The example I gave in the brief is if you have a
17 name and address of someone, and you don't have their
18 occupation, but their name and address appears in three or
19 four other committee contribution lists, and their
20 occupation is listed, but they won't tell you the
21 occupation, why not take it and put it in your list?

22 The Commission's current regulations require you
23 to get information directly from the contributor. There are
24 a lot of other ways that contributor information that's
25 available in the FEC's list can be used to enhance

1 compliance with the statute that would require regulation
2 changes.

3 This case, you know, is the first, and if the
4 Commission brings a case against Aristotle, it will be the
5 last, time that anyone tries to use FEC data to increase
6 compliance, and I know there are going to be a lot of
7 questions, so I would like to, if the Chairman would permit,
8 open the floor to questions.

9 CHAIRMAN WALTHER: Thank you very much. Are there
10 any questions?

11 I have a question on this issue of solicitation
12 and the method of which that could be done. Is that still
13 available under your system present or not?

14 MR. HERSHKOWITZ: Not using this data. What
15 happens is a committee has names of individuals that have
16 already contributed, or they bought a list from someone, and
17 they want to solicit those people. They do that now. They
18 don't use, as a practical matter, they don't use this
19 feature.

20 What we have suggested that they do is to use the
21 feature to make sure that a contribution that they get
22 doesn't exceed the contribution limit, but you have to do
23 that each time you look up a contribution. Unlike all of
24 the other MURs and the AOs, people are downloading entire
25 lists, pursuant to certain types of criteria, for example,

1 all of the Gore Committee contributors or contributors to
2 Republican Party candidates in the State of Ohio.

3 Here, if I was your campaign manager, and I wanted
4 to solicit a contribution to somebody, I would have to have
5 the name and address of that person in my databank already
6 because they were a contributor, or I bought the name, and
7 then if I was interested in finding out how much that person
8 contributed to some other committee, then I would go to the
9 feature and look that up.

10 CHAIRMAN WALTHER: Does it give a printout?

11 MR. HERSHKOWITZ: No.

12 CHAIRMAN WALTHER: So if somebody types in, say,
13 they wanted to check if there is a P.O. box and then when
14 they made a contribution before they used a street name, so
15 they typed in the street name, that name, they couldn't
16 access it. It would have to match exactly the way they did
17 it with the FEC.

18 MR. HERSHKOWITZ: That's right. It looks it up
19 the way it's in the database already of the committee. So,
20 if that person spells his name E-Y and, in the Commission's
21 database, it's Y, he won't find it.

22 CHAIRMAN WALTHER: Coincidentally, if the mailing
23 list that somebody went by, let's say the Gore list, had
24 names and addresses, and some of those addresses, of course,
25 have changed or maybe two addresses were used for some

1 reason, you are not allowed access into the name alone.

2 MR. HERSHKOWITZ: I do not believe so, and it
3 would not correct the address. I know it would not correct
4 the address because all you get is contributor history.

5 CHAIRMAN WALTHER: You could type in a name.

6 MR. HERSHKOWITZ: You could type in a name. You
7 know, I don't know if it checks the address or not. That's
8 something I would have to get back to you on. But if you
9 were sending out a letter to that person to do a
10 contribution or you had the phone number and one of those
11 things had changed, you could not correct it by using this
12 feature. So this feature will not help you.

13 CHAIRMAN WALTHER: I'm just trying to see how
14 accurate you would have to be to access it, if you have to
15 have both the name and address.

16 MR. HERSHKOWITZ: I have the manual here. If we
17 take a break, I can check it.

18 CHAIRMAN WALTHER: Well, we can do it later on.
19 Commissioner Beverly?

20 COMMISSIONER BEVERLY: Thank you. I have sort of
21 a follow-up technical question.

22 So your customers -- the database you're referring
23 to is the committee's own database, which, I presume, is
24 part of your software package, and Aristotle has a database.

25 MR. HERSHKOWITZ: Right. As a committee member, I

1 would, as a committee, yes. I put my information into the
2 Aristotle database.

3 COMMISSIONER BEVERLY: Right. And so if I've got
4 a name in my database already, and I got to this feature,
5 and I search for this information, and the information is
6 coming from there, is it linking back to Aristotle or
7 linking to the Commission?

8 MR. HERSHKOWITZ: Well, it links to Aristotle, but
9 Aristotle has that information from the Commission.

10 COMMISSIONER BEVERLY: Okay. It's static, where
11 you can pull it down ever so often, or is it -- I'm trying
12 to understand the interface between Aristotle and the
13 Commission's information. How do you get the information
14 into Aristotle?

15 MR. HERSHKOWITZ: It's downloaded from the
16 Commission's database. The technical people know how to do
17 that.

18 COMMISSIONER BEVERLY: I'm just trying to make
19 sure I understand where the information is housed when your
20 customers access it.

21 MR. HERSHKOWITZ: It's housed in Aristotle's
22 computer because Aristotle's computer is faster than the
23 Commission's computer. So it comes down to Aristotle's
24 computer, and then it's accessed faster that way.

25 COMMISSIONER BEVERLY: Okay.

1 MR. HERSHKOWITZ: They could have written a
2 program that did the exact same thing, that looked up the
3 information in the FEC's computer; it just would have been
4 slower.

5 COMMISSIONER BEVERLY: And on behalf of Mr.
6 Palmer, I'll say that I'm sure we all wish we had faster
7 computers so that other people wouldn't have to do this
8 work.

9 My question, then, is, you've been focusing a lot
10 on the use by your customers of the data comes from the FEC,
11 but can you talk a little bit about the use by Aristotle of
12 the data because you're pulling our data into your system,
13 and then you're housing it there for your customers to
14 access, so it seems to me that whatever use is being made by
15 the customers at that first instance, Aristotle is using it
16 for a commercial purpose?

17 Am I misunderstanding the facts of how you're
18 using it, because you're pulling the data, as I understand
19 it, into Aristotle in whatever formula, and then you're
20 allowing your customers to access it in this feature? So
21 I'm trying to understand whether that could be viewed as a
22 use of the Commission's data for a commercial purpose
23 because I know it's part of the package, and I know you've
24 made some arguments about it can't be sold separately, and
25 all of that, but, in the first instance, is that a use by

1 Aristotle?

2 MR. HERSHKOWITZ: I think you've hit an
3 interesting problem in the way that both of the briefs have
4 been written, we have muddled ourselves the issue of the
5 committee versus Aristotle. The committee is subject to the
6 solicitation part of the statute. Aristotle doesn't
7 solicit, but it is subject to the commercial use section,
8 and, of course, "commercial use" is something to be defined.

9 As I understand the general counsel's brief, they
10 say that commercial use is the sale by Aristotle of this
11 information. Aristotle gets the information from the
12 Commission and sells it. That is a commercial use.

13 The problem with that interpretation is the
14 statute says commercial use for an improper purpose. We
15 know, from the Commission's AOs, that there are a lot of
16 uses of FEC data that are solely used by for-profit and not-
17 for-profit companies that's not for an improper purpose.

18 An improper purpose, I suggest, is solicitations,
19 but there are a lot of -- if you want, I can give you some
20 AOs. In fact, I'll read one sentence from the IFI
21 concurring opinion by Justices Ginsberg, Edwards, Buckley,
22 and Randolph, because I anticipated this question. It says:
23 "Section 438(a)(4) does not condition access to FEC
24 contributor lists by ACPA and other fund seekers on their
25 abstaining from solicitation altogether. Not even does it

1 inhibit them from contacting the very individuals whose
2 names appear on the FEC's lists they inspect so long as the
3 solicitees' names are obtained from an independent source."

4 In other words, if you get the names and
5 addresses, and BCD says the addresses are even okay, but if
6 you get the names from some other source, you can use the
7 FEC data for solicitation purposes.

8 Now, the Commission's AOs, I don't think, go as
9 far as solicitation, but they use FEC data for all kinds of
10 other purposes. You had an AO a couple of weeks ago where
11 FEC data was used to send out a letter. You have AOs where
12 FEC data is used to create directories.

13 COMMISSIONER BEVERLY: I'm going to interrupt you
14 for one second because I want to go back to the commercial
15 use part because the AO suspension, as a recent inspector at
16 AO, there's a couple in that line of cases where either
17 candidates or someone in opposition to a candidate wanted to
18 send information, and I think they argued in those requests
19 was related to a campaign. I don't think any of those can
20 be characterized as "commercial."

21 I want to make sure I got you right because I
22 thought what you were saying is, when it comes to commercial
23 use, the only improper purpose is to solicit as a
24 solicitation.

25 MR. HERSHKOWITZ: Right, and that's what Senator

1 Belman and Senator Cannon were talking about. When you read
2 their statements on the record, they are talking about list
3 brokering.

4 COMMISSIONER BEVERLY: Go ahead.

5 COMMISSIONER WEINTRAUB: I'm just looking at the
6 statute. It says that any information, not just names or
7 addresses, any information copied from such reports or
8 statements may not be sold or used by any person for the
9 purpose of soliciting contributions or for commercial
10 purposes.

11 It seems to me that what you're saying is those
12 words "or for commercial purposes" aren't really there, or
13 they don't have any meaning.

14 MR. HERSHKOWITZ: What I'm saying is, "commercial
15 purposes" is an ambiguous term.

16 COMMISSIONER WEINTRAUB: You sell something for a
17 profit. That's a commercial purpose.

18 MR. HERSHKOWITZ: PCD, Legitech, IFI; they all say
19 the definition of "commercial purpose" is ambiguous. It's
20 up to the Commission to define it.

21 The Commission, in the NGP AO --

22 COMMISSIONER WEINTRAUB: I remember that one.

23 MR. HERSHKOWITZ: The Commission, in the NGP AO
24 was presented with a draft that said, any for-profit
25 organization that used any information for any purpose was

1 in violation of the statute. That section was taken out.
2 That was the thing that was removed by the Commission, by
3 unanimous vote, before the draft was approved.

4 The reason I brought up the AOs about committees
5 using is because if Senator Belman's and Senator Cannon's
6 statements mean anything, it means that what they were
7 trying to prevent was people being solicited by all kinds of
8 folks for contributions or for donations or for sales using
9 the FEC lists. They were very explicit about what they were
10 talking about in the legislative history.

11 COMMISSIONER WEINTRAUB: But that can't supersede
12 the words in the statute. What they say on the floor can't
13 supersede the words of the statute, "or for commercial
14 purposes."

15 MR. HERSHKOWITZ: Right.

16 COMMISSIONER WEINTRAUB: It's got to have some
17 meaning. Right?

18 MR. HERSHKOWITZ: Right, but if you say that it
19 can't be used for any purpose at all, then it can't be used
20 for compliance purposes and vetting. Are you saying that?
21 I don't think so.

22 COMMISSIONER WEINTRAUB: That's not a commercial
23 purpose.

24 MR. HERSHKOWITZ: It was here. It is in this
25 case.

1 COMMISSIONER WEINTRAUB: Well, you say it's for
2 compliance and vetting, but --

3 MR. HERSHKOWITZ: The only way the Committee gets
4 the access to the data is through a commercial sale or a
5 commercial use.

6 CHAIRMAN WALTHER: Why can't they do it
7 themselves, just go to the FEC website and get that
8 information? That's what it's all about.

9 MR. HERSHKOWITZ: Are you suggesting that you
10 don't want the intermediaries -- the vendors, the NGPs, and
11 the Aristotles of the world -- making it easier for the
12 committees to put it into their database?

13 CHAIRMAN WALTHER: It does depend on the selling
14 of data, or the way you put it together, that's considered
15 use. I just trying to flesh it out a little bit here.

16 MR. HERSHKOWITZ: I understand that.

17 CHAIRMAN WALTHER: What results is an enhanced
18 version of the data.

19 MR. HERSHKOWITZ: I'm not arguing with
20 Commissioner Weintraub about the wording of the statute.
21 I'm just saying that the statute is written very broadly,
22 and it's ambiguous, and it's up to the Commission to
23 determine how it's going to be interpreted, and the
24 Commission has interpreted the statute in the past to permit
25 all kinds of uses of data by committees that are not

1 improper, and I believe what she suggested is that if you
2 put an intermediary between the committee and the data, and
3 that intermediary is a nonprofit or a profit -- right? --
4 and gets paid for that data, or uses that data to attract
5 advertisement to that website, then that's an improper use.

6 That's a sale. That's a commercial use.

7 I'm saying that the Commission should be looking
8 at the picture here. The context is important. There is no
9 sale for the purpose of harassing, soliciting prior
10 contributors.

11 CHAIRMAN WALTHER: Well, if you had a list of
12 addresses of potential contributors and you want to decide
13 how many you were going to solicit, you would use it as a
14 fillup to tell you who is capable of being most successfully
15 solicited? Am I correct on that?

16 MR. HERSHKOWITZ: That's what the NGP AO
17 described. The NGP AO described a situation where computer
18 software was being used to download massive amounts of
19 contributor information. You put your names, and all of the
20 FEC data would be directed into your database, and then you
21 could use the functions in the NGP software to organize it,
22 to sort it, to pick people who you want to solicit.

23 You can't do that with Aristotle. Aristotle; it's
24 a one-time look-up. So, no, it would be practically
25 impossible. You would have to physically look up every

1 person in the database, write down the information you were
2 interested in, put it into an Excel spreadsheet, and then
3 organize it. This was designed to prohibit that. It was
4 designed to make it impractical to use this data to create a
5 database for the purpose of deciding who to make
6 solicitations to.

7 CHAIRMAN WALTHER: It's my understanding that if
8 you have amassed the data to make it more attractive for
9 extraction purposes and making money off it, in extracting
10 the data, you collect the data, you enhance, you make it
11 available in a certain way, and for that, you have a right
12 to -- you were trying to make money. Whatever your success
13 was I guess the question. Isn't that a use of the data for
14 commercial purposes?

15 I think I look back at the intent of the statute
16 to a large degree has to be people have to disclose.
17 Sometimes that's not easy for people to do. So if you can
18 make that something that the person has to have his name or
19 her name reported and address, that's so available that it
20 becomes used for a lot of things, and certainly I could see
21 where you would take data and look at all the people who
22 contributed at this certain time during this certain
23 election and they were in response to certain events or for
24 sociological studies, when we start drawing down and getting
25 people's information and becoming more educated about what

1 they do, it seems to me you're getting into some privacy
2 issues here.

3 MR. HERSHKOWITZ: Well, but you already have the
4 name and address of this person.

5 CHAIRMAN WALTHER: Yes, you do.

6 MR. HERSHKOWITZ: Even in the -- I forgot the name
7 of the statute where that prevents telephone solicitors from
8 calling us up, you know, at dinnertime -- if you have a
9 prior relationship, you know, that's the exception to that
10 statute. These people have a prior relationship.

11 COMMISSIONER WEINTRAUB: Is there a provision like
12 that in our statute?

13 MR. HERSHKOWITZ: Well, if you are saying that
14 it's enhancing the solicitation, what I'm saying is it's not
15 enhancing the solicitation because you have the name and
16 address. This is somebody you've decided to solicit or have
17 already solicited before you go into this feature to find
18 out who they have contributed to and how much they have
19 contributed before. You've already made that decision.
20 You're not using the data -- Chairman, you used the term
21 "enhancing the data."

22 The only thing that this does is it pulls -- it's
23 like going downstairs and putting in my name to see who I've
24 contributed to before. You do it once. You've got the
25 names. You can't download it. If you want to find out who

1 my wife contributed to, you have to put her name in. So
2 you're not enhancing a contribution list at this --

3 CHAIRMAN WALTHER: Well, you have to assess the
4 accessibility of it first.

5 MR. HERSHKOWITZ: Well, it's faster. That's all.
6 I just don't know what else to say. If that is a
7 commercial use that's prohibited by the statute, that's a
8 very, very broad reading of the statute. If the statute is
9 designed to prohibit list brokering, this is not list
10 brokering. I mean, that's what the statute was designed to
11 prohibit was list brokering.

12 CHAIRMAN WALTHER: I'm going to ask you one
13 question and then I'm going to pass it to Donny. But if you
14 made a list out of it, you're enhancing the accessibility of
15 the data, and that's illegal, okay? So, if you don't make
16 the list, but you collect all the contributions an
17 individual made, it's the same type of thing. You are doing
18 things with the data to make a commercial use out of it. I
19 think that was one of the things that to me we would
20 interpret as being ambiguous, but I don't see the ambiguity
21 here. I just want to raise the point because you were asked
22 a lot of questions --

23 MR. HERSHKOWITZ: Okay. Well, let me just respond
24 to that one point quickly.

25 There is information in the cases and in the FEC

1 AOs that talks about the value of lists, and the value of a
2 list is the name, address, or phone number of a potential
3 contributor. You're suggesting that this other information
4 makes the list more valuable for solicitation purposes, and
5 I'm suggesting, if that was true, people would use it for
6 that purpose, and they aren't using it. There is no
7 additional value added for solicitation purposes by
8 providing prior contribution information. The only value
9 might be for compliance, if they used it that way.

10 CHAIRMAN WALTHER: Commissioner Weintraub.

11 COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

12 I think you're all over the map here because,
13 first, you said, "Well, we did advertise it as being useful
14 for figuring how much to solicit, but that was a mistake,"
15 and then you said, "but it really can't be used for that
16 purpose, and, in fact, nobody is using it for that purpose."

17 So whether it could be used for the purpose or
18 couldn't be used for the purpose, nobody is doing it, so
19 sort of no harm, no foul, I think, is maybe the argument,
20 and you seem to be suggesting that it's okay to resolicit
21 somebody, that if you've already got the names and
22 addresses, and you use this to decide how much to ask them
23 next, that that's okay. That's not a solicitation. I'm
24 just, like, really confused about what you're arguing.

25 MR. HERSHKOWITZ: Okay. There was a mistake

1 historically talking about using this to determine how much
2 to ask for. We admit that.

3 COMMISSIONER WEINTRAUB: Can it be used for that
4 purpose?

5 MR. HERSHKOWITZ: Physically, it can be used to
6 determine, yes, because you can look up to see how much
7 somebody has provided in the past. We have warnings now
8 that say you cannot use it for solicitation purposes. You
9 would be violating those warnings if you did that. Those
10 warnings existed orally when the sales people talked to
11 them, talked to potential customers, and it is on the
12 website and on the screen shot, whenever that comes up, so
13 there is now a warning.

14 So let's talk about, you know, after four months,
15 not the first four months but since then. Since then, there
16 are these warnings that say you can't use it for
17 solicitation. You should use it only for compliance and
18 vetting.

19 Now, you've asked whether or not it's physical
20 possible to do what shouldn't be done, what we say should
21 not have been done, and the answer is, yes, you can look it
22 up before you make the solicitation to see how much somebody
23 has contributed.

24 The next question is, is that a commercial use?
25 Well, I say there is no value in that.

1 COMMISSIONER WEINTRAUB: Well, is it a
2 solicitation now?

3 MR. HERSHKOWITZ: Well, certainly, it's a
4 solicitation, but there is nothing wrong with making a
5 solicitation to somebody who you already have on your list.
6 You haven't gone to the FEC and gotten a new name. You've
7 only solicited people who you already have permission to
8 solicit.

9 COMMISSIONER WEINTRAUB: And somebody who has been
10 solicited; what sorts of entities?

11 MR. HERSHKOWITZ: I think we all have.

12 COMMISSIONER WEINTRAUB: I would contest the
13 notion that just because I had a moment of weakness and
14 contributed once that I am giving people to solicit me for -
15 -

16 MR. HERSHKOWITZ: I won't disagree with that, but
17 the statute and prior Commission regulations say it's okay
18 for committees to resolicit their contributors. It's not a
19 violation of the statute.

20 COMMISSIONER WEINTRAUB: Well, it's not a
21 violation of the statute to resolicit your own contributors
22 based on your own data. The question is, does that belong
23 to the restriction on any information copied from such
24 reports or statements may not be solely used by any person
25 for the purpose of soliciting contributions?

1 MR. HERSHKOWITZ: And when you go back through the
2 AOs, except for NGP AO, and all of the cases, what's listed
3 there is use of names and addresses. PCD said you can even
4 use names and addresses.

5 I just read to you from IFI that says you can use
6 anything other than a name and an address to make
7 solicitations, and that was written by Justice Ginsberg.

8 COMMISSIONER WEINTRAUB: You're not arguing that
9 Aristotle is a media entity, are you?

10 MR. HERSHKOWITZ: That's correct.

11 COMMISSIONER WEINTRAUB: I just wanted to clarify
12 that.

13 COMMISSIONER MCGAHN: Without getting into your
14 clients, do you have media clients, and if you can't answer,
15 could somebody who claims to be the media client buy your
16 stuff?

17 MR. HERSHKOWITZ: Anybody can buy this software.
18 I don't believe we have any media. It's marketed to
19 campaigns.

20 COMMISSIONER MCGAHN: But academics, if they
21 wanted to get the data, could --

22 MR. HERSHKOWITZ: Why would an academic who had
23 the name and address of somebody want to look up --

24 COMMISSIONER MCGAHN: It pushes you closer to the
25 media side.

1 MR. HERSHKOWITZ: Obviously, but I'm saying nobody
2 would be interested in it because you're only looking it up
3 one at a time.

4 COMMISSIONER WEINTRAUB: (Away from microphone.)

5 COMMISSIONER McGAHN: Let me try another way.

6 MR. HERSHKOWITZ: Okay.

7 COMMISSIONER McGAHN: What I'm hearing is an
8 argument, reading the language of the statute, it looks like
9 "commercial purpose." That's all well and good if the
10 statute was passed yesterday, but there is a lot of water
11 under the bridge, isn't there? You've talked about AOs, and
12 you just referenced a Second Circuit case. Isn't that sort
13 of, per se, and been rejected by the Second Circuit?

14 MR. HERSHKOWITZ: It's been rejected by the Second
15 Circuit, by the D.C. Circuit, and it's been rejected by the
16 Commission and NGP AO.

17 COMMISSIONER McGAHN: So we are where we are, not
18 on really on a clean slate, and it seems to me, looking at
19 the Second Circuit decision, they got into some policy
20 implications, and there is language they use, taking the
21 risk of harassment of contributors, and are privacy
22 interests damaged? Could you talk a little bit about that
23 sort of policy implication here because, based upon my
24 review of the record briefs, all briefs, I don't see the
25 threat to the actual contributors, which is what I see as

1 the main purpose of this statute? You don't want to harass
2 contributors and that sort of thing.

3 Help me out. Help me put this into the framework
4 of the Second Circuit case.

5 MR. HERSHKOWITZ: Well, in this particular case,
6 the Second Circuit and the D.C. Circuit, I think, are on the
7 same footing.

8 COMMISSIONER McGAHN: We're in D.C. right now, so
9 what D.C. Circuit matters does the agency have?

10 MR. HERSHKOWITZ: When they talked about
11 "commercial purpose," they are talking about list brokering.
12 They have read the colloquy on the floor of the Senate, and
13 it explicitly says "no solicitation," and it says
14 "commercial purpose." Well, the commercial purpose they are
15 talking about there is the sale of information for the
16 purpose of making solicitations. It's list brokering, and
17 that's names and addresses.

18 I mean, the only distinction between the D.C.
19 Circuit and the Second Circuit is the D.C. Circuit says
20 "names and addresses," and the Second Circuit says, "Names
21 are okay as long as you don't have addresses," and the
22 reason they say that, both of them say that, is because they
23 are talking about list brokering, the value of the
24 information to a list broker. There is no commercial value
25 to a list broker of contribution information without names

1 and addresses. In fact, they go so far, both of them go so
2 far, as to say the only value of the list in the FEC
3 databank is names and addresses, and that's the value to a
4 list broker.

5 Now, in this particular case, you asked about
6 harassment. If you already have, the committee already has,
7 names and addresses and phone numbers, and they call you
8 every single night and ask you for a contribution, you may
9 consider that harassment, but the regulations don't prohibit
10 that because the names and addresses did not come from the
11 FEC list; they came from someplace else, your own
12 contribution list or a list you purchased.

13 COMMISSIONER McGAHN: So, essentially, at issue
14 here is enhancement to an already existing list that a
15 committee would have.

16 MR. HERSHKOWITZ: Well, I guess somebody would
17 make an argument that if you enhance a list to make it more
18 valuable for list-brokering purposes, and then you sold it,
19 and you have enhanced the value of the list, then you've got
20 a commercial purpose, but you have not enhanced the value of
21 the list by merely including contribution information that
22 can't be downloaded en masse into a databank. So you have
23 not enhanced a contribution list. You have not enhanced a
24 list that list brokers can sell.

25 CHAIRMAN WALTHER: How do you acquire that

1 information?

2 MR. HERSHKOWITZ: The names and addresses?

3 CHAIRMAN WALTHER: Do you have a computer that
4 grabs that?

5 MR. HERSHKOWITZ: The names and addresses?

6 CHAIRMAN WALTHER: No, the compilation. That is,
7 if somebody at your computer do the searching all the way
8 through the database in every state, every source of funding
9 of that one individual and then makes a list of all
10 contributions based upon that and that's done at the time
11 somebody asks for it in other words?

12 MR. HERSHKOWITZ: Yes. Right. It appears on the
13 screen, and then that's all you can do with it is read it.

14 CHAIRMAN WALTHER: Now, when you get on the
15 screen, does it give you the address at that time?

16 MR. HERSHKOWITZ: No. You have to have the name
17 and address before you enter that information.

18 CHAIRMAN WALTHER: We went through that about
19 whether or not you have to type in the amount.

20 MR. HERSHKOWITZ: You certainly have to have the
21 name. Right.

22 CHAIRMAN WALTHER: Okay. So it's just the name.

23 MR. HERSHKOWITZ: You cannot download the address
24 from the Commission's files. That is not information that's
25 provided.

1 CHAIRMAN WALTHER: You're saying from what I
2 understand it's possible. You just have to have the name,
3 you open it up and you get the name, Ellen Weintraub, and
4 then you would get the address, wouldn't you?

5 MR. HERSHKOWITZ: I have the address because I've
6 already gotten a contribution from her.

7 CHAIRMAN WALTHER: As I understand it, though, you
8 can get into the database possibly -- I'm not sure yet --
9 with just having the name and maybe the address is not an
10 accurate one, you type in an address, and it comes out as I
11 understand it.

12 MR. HERSHKOWITZ: If you have to type in both, you
13 wouldn't get it. I mean, the question is whether or not you
14 can type in just a name and download information based on
15 the name, and I don't know that answer, but you cannot get
16 an address from the system, and you cannot correct an
17 address from the system.

18 CHAIRMAN WALTHER: Do you get the address in here
19 if we see it again?

20 MR. HERSHKOWITZ: No.

21 CHAIRMAN WALTHER: You just have the name and the
22 amount.

23 MR. HERSHKOWITZ: You just get the amount. You
24 have to put the name in it.

25 CHAIRMAN WALTHER: And it just gives you a blank

1 list --

2 MR. HERSHKOWITZ: Yes.

3 CHAIRMAN WALTHER: -- of the recipients of those
4 donations.

5 MR. HERSHKOWITZ: Yeah.

6 COMMISSIONER McGAHN: So this is why academics or
7 media wouldn't want it because, without the prime mover of
8 already knowing what you're looking for, this is useless to
9 you.

10 MR. HERSHKOWITZ: Absolutely.

11 COMMISSIONER McGAHN: It's sort of like a voter
12 file that gets things appended to it. Unless you know what
13 you're doing -- everybody can find the voter file, but
14 without that, it's the same kind of thing.

15 MR. HERSHKOWITZ: It's like a phone book, and if
16 you know the name, you can look up the phone number, but if
17 you have the phone number, you can't -- that's all it does
18 for you, and if you wanted to find out everybody who lives
19 in a particular area, you know, the 476-XXXX, you couldn't
20 do it this way.

21 COMMISSIONER McGAHN: Which is wholly different
22 than what I think of, as a practical matter, as an enhanced
23 list or taking FEC data to build a real fundraising list to
24 prospect off. That's not what we're describing at all.

25 MR. HERSHKOWITZ: That's right. You can't target.

1 There is no targeting permitted. There is no enhancement
2 for targeting purposes. There is no prospecting.

3 COMMISSIONER McGAHN: So we agree that if someone
4 took FEC, built a prospecting list, and sold it, that's a
5 problem. Somewhere on the continuum we cross into
6 permissible activity. Your assertion is your activity is on
7 that permissible side of the line.

8 The question I always tend to ask myself, and
9 sometimes I ask out loud, and it may be that the law is so
10 confused that you can't answer this, but what in our
11 analysis is the question of law and what's the question of
12 fact? Because when you talk about commercial purpose and
13 the intent and that kind of thing, is that a legal
14 conclusion, or is that a fact-based analysis?

15 Help me connect the dots on whether we're making
16 new law here or clarifying inconsistent law or really this
17 is a factual question as to whether you reach a rule that,
18 well, isn't frankly clear, but let's assume the rule is
19 clear. It may be so hopelessly jumbled it's a mixed
20 question, but, to me, there needs to be a rule somewhere
21 that comes out of this.

22 MR. HERSHKOWITZ: Well, I certainly made the
23 argument in the brief that there the law permits this. The
24 general counsel has made an argument that the law doesn't
25 permit this, and I think Commissioner Weintraub and

1 Commissioner Beverly have described what the general
2 counsel's argument is.

3 As I started, I think things are muddled --

4 COMMISSIONER McGAHN: Aren't there factual issues
5 buried in that approach? If it's just a per se legal
6 question, the Second Circuit has already kind of told us
7 that's not how we're supposed to do it.

8 MR. HERSHKOWITZ: I think that's correct, but --

9 COMMISSIONER McGAHN: So we can maybe agree on the
10 law here. We have factual issues that divide us.

11 MR. HERSHKOWITZ: I think we can agree on the
12 factual issues. I think the problem is that there is a
13 difference of opinion about what the law should be.

14 COMMISSIONER McGAHN: Okay.

15 MR. HERSHKOWITZ: What I have heard is somebody --
16 the general counsel thinks the law should be that anytime
17 you sell any Commission data, you've violated the law.

18 CHAIRMAN WALTHER: Well, the statute is very clear
19 about that.

20 MR. HERSHKOWITZ: The statute can be read that
21 way, but the case history doesn't say that, and your AOs
22 don't say that. Your AOs say that there are a lot, a lot,
23 of different uses you can make of FEC data that doesn't
24 involve a solicitation and, therefore, is okay, that this
25 statute goes to solicitations.

1 Now, there has been an attempt to expand that word
2 "solicitation" to "harassment," but even if you expand the
3 term "solicitation" to "harassment," the facts of this case
4 don't fit that either because you've already decided to make
5 the phone call, and you already have the name and phone
6 number where you make the mailing, and you had the name and
7 address from a permissible source, not from the FEC.

8 COMMISSIONER WEINTRAUB: But you said one of the
9 purposes is to decide whether to make that phone call. You
10 want to see who else these guys have given to. Maybe you
11 don't want to be associated with the other folks they have
12 given to.

13 What's the compliance benefit to the Committee?
14 This goes to committees; it doesn't go to donors. From a
15 committee standpoint, they want to make sure that they don't
16 accept an excessive contribution from that individual donor,
17 that they don't take more than \$2,400 from that donor.

18 MR. HERSHKOWITZ: Well, they don't want to take
19 the last \$3,000 after the \$47,000. They don't want to go
20 over the limit.

21 COMMISSIONER MCGAHN: Someday they might have to
22 give it back, and they may not have the money at that point
23 because they may have spent it.

24 MR. HERSHKOWITZ: Suppose that happened routinely
25 and then got audited. I mean, they just don't want to

1 violate the law.

2 COMMISSIONER WEINTRAUB: Is it your experience
3 that most committees do that level of due diligence?

4 MR. HERSHKOWITZ: It's our experience that the
5 committees don't do any and don't do any compliance work,
6 and that's one of the things that I think this Commission
7 should be struggling with, that the committees were given a
8 chance to do compliance here, and they don't use it.

9 COMMISSIONER WEINTRAUB: Well, then why don't you
10 just give up on this? Why are you insisting on maintaining
11 a feature that you say nobody uses? You could give it away.
12 You could put it up on your website and let people have it
13 for free. That would be okay with you. What do you need it
14 for?

15 MR. HERSHKOWITZ: There are two reasons. One is
16 Aristotle believes that this is a demonstration of their
17 technological prowess, and the other is Aristotle believes
18 in compliance. They sell their product, bragging about the
19 disclosure compliance that customers have, and they say
20 that's because of the software and the service that they
21 provided, to answer questions from committees, and they
22 don't want to be in the position of admitting to a violation
23 when compliance is their reputation. It's their business.
24 They cannot admit to a violation. They can put this on
25 their website and make it available, but they cannot admit

1 to a violation.

2 COMMISSIONER WEINTRAUB: Could they give it up
3 altogether?

4 MR. HERSHKOWITZ: Well, personally you're asking?
5 They don't want to. As their attorney, let me tell you
6 I've asked that question. They do not want to because they
7 believe, again, it shows their technological prowess. It's
8 something that they have available to their customers that
9 nobody else has.

10 COMMISSIONER WEINTRAUB: But nobody uses it.

11 CHAIRMAN WALTHER: Thank you. We're getting short
12 on time. Counsel, are there any questions you have? We've
13 got five minutes left.

14 MS. DUNCAN: Thank you, Mr. Chairman. We don't
15 have any questions.

16 CHAIRMAN WALTHER: Okay. Mr. Palmer?

17 MR. HERSHKOWITZ: I'll stay here as long as you
18 have questions.

19 CHAIRMAN WALTHER: Well, we typically take an
20 hour, and you have about five minutes to close if you'd
21 like.

22 MR. HERSHKOWITZ: I would rather use the five
23 minutes to answer questions.

24 CHAIRMAN WALTHER: All right. Are there any
25 further questions? Commissioner Weintraub?

1 COMMISSIONER WEINTRAUB: I just want to comment on
2 something that you said repeatedly, which is that, in NGP,
3 the Commission rejected the language that the counsel had
4 drafted, and then it didn't show up.

5 You have spent enough time in this building to
6 know that because language is drafted and then ends up
7 coming out, it's not necessarily an affirmative decision by
8 six commissioners that, "Oh, we definitely don't want to say
9 that."

10 I've found that the only person who would still
11 know, and I don't remember, but I will go back and see if I
12 have any old e-mails on this, but language gets pulled out
13 of AOs for all sorts of reasons.

14 MR. HERSHKOWITZ: Yes, but there are other AOs.
15 The appellate court cases that Commissioner McGahn referred
16 to all talk about a contextual analysis, not a per se
17 violation. So the Commission was correct to pull that out.

18 CHAIRMAN WALTHER: Thank you very much, Mr.
19 Hershkowitz.

20 MR. HERSHKOWITZ: I will suggest, if I have a
21 couple of minutes, the NGP AO has very little analysis. In
22 fact, I would go so far as to say it has no analysis. If
23 you take a look at some of the other AOs, there is enormous
24 discussion about why a decision was made. That doesn't
25 exist in the NGP AO.

1 I think you've got conflicts between MUR 5155 and
2 a lot of AOs where there you have somebody downloading
3 information into a list and brokering it, selling that
4 information, but the fact that it was given away -- first of
5 all, I don't think it was given away for free. It's being
6 used for advertising purposes, but even if it were not, even
7 if it were given away for free, what difference should that
8 make if somebody is using this information to create lists
9 for purposes of list brokering?

10 Again, there are a number of things that the
11 computer can do to help the Commission increase its
12 disclosure and compliance at the committee level. Now, I
13 don't think you have to mandate it, but you certainly
14 shouldn't discourage it, and that doesn't require a rule
15 change here, but it will require rule changes for other
16 things.

17 CHAIRMAN WALTHER: Thank you very much, Counsel,
18 for your presentation. I appreciate it very much. Your
19 brief was very good.

20 MR. HERSHKOWITZ: Thank you.

21 CHAIRMAN WALTHER: I'll let you know how we do
22 this. Thank you. The meeting is adjourned.

23 (Whereupon, at 4:10 p.m., the hearing in the
24 above-entitled matter was concluded.)

25 //

